

RNG

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1480 OF 2010

Punam Co-operative Housing Society Ltd. .. Petitioner

VS

- | | |
|---|-----------------|
| 1. Alok Agarwal | } |
| 2. Shibani Alok Agarwal | } |
| 3. The Divisional Joint Registrar
Co-operative Societies, Mumbai | } |
| 4. The Deputy Registrar, Cooperative
Societies, Mumbai | } |
| 5. Officer, Grade 2 having his office
at D Ward, Mumbai | } |
| 6. S.H.More then Administrator
of Punam Coop Housing Society Ltd | } |
| 7. The State of Maharashtra | }...Respondents |

with
CONTEMPT PETITION (L) NO.84 OF 2010
with
CHAMBER SUMMONS NO.263 OF 2010
with
CHAMBER SUMMONS NO.294 OF 2010
with
CHAMBER SUMMONS NO.308 OF 2010
with
NOTICE OF MOTION NO.614 OF 2010

Mr. Deepak Chitnis with Ms.Sonali Dalvi i/b M/s Deepak Chitnis Chiporkar & Co for Petitioner

Ms.Malika Taly with Mr.Nikhil Varma i/b M/s S.Mohamedbhai & Co for Respondent nos.1 and 2

Mr.M.A.Sayed Assistant Government Pleader for State

CORAM : G.S. KULKARNI, J.

DATE : 26 July, 2019

JUDGMENT:

1. This petition under Article 226 of the Constitution of India, challenges an order dated 31.3.2019 passed by the Divisional Joint Registrar, Co-op. Societies, Mumbai Division, Mumbai whereby a Revision Application filed by the petitioner under section 154 of the Maharashtra Co-operative Societies Act, 1960 (for short 'the MCS Act') against an order dated 10.10.2008 passed by the Deputy Registrar, Co-operative Societies, 'D' Ward, under section 23 (2) of the MCS Act granting membership of the petitioner's society to respondent nos.1 and 2, stands confirmed.

2. Briefly, the facts are :

The petitioner is a Co-operative Housing Society registered under the MCS Act.

3. Respondent no.1 is a purchaser of flat no.1 situated on the first floor of the petitioner's premises known as "Punam" situate at Malabar Hill Division, Nepean Sea Road, Mumbai alongwith a covered garage below the children's play area. (for short, the 'said flat'). Respondent no.2 is an Associate Member along with respondent no.1. Respondent no.1 purchased the said flat under a registered Deed of Transfer dated 30.5.2007 executed by the erstwhile owners of the flat namely Mr.Pratap Issardas Bhatiya, Ramesh Issardas Bhatiya and others for consideration of Rs.4 crores. From a reading of the Deed of Transfer, it appears that these vendors were the residents of Dubai, U.A.E. The record indicates that the transfer was effected after issuance of a public notice inviting objections, as issued on behalf of respondent nos.1 and 2. The transferors also submitted a letter of consent for transfer of the share-certificates qua the said flat in favour of respondent nos.1 and 2. Perusal of the correspondence between the parties prior to entering of the Deed of Transfer indicates that there were some issues in regard to the open space adjoining flat no.1. In this regard in the minutes of the 42nd Annual General Meeting held on 30.7.2006, the following was recorded :

"11. To apprise, discuss and decide matters pertaining to the open space adjoining to flat no.1 and similar open space on the higher floors.

Mr Kiran Bajaj has thrown light on past history of the open space adjoining to flat no.1 and how it was under use of present occupant member and the then occupant member. He stated this space was also under the common use of society members and their children. According to the opinion of an advocate, any open space in the society its always belongs to the society and remains with society.

. After long discussion, it was decided that management can issue No objection letter only for transfer of shares in respect of concerned flat. Open space should be kept open for the common use by the society members.

Further similar objections in case of terrace on 8th floor was raised & since it is the property of the society, it was decided to take possession of the same at the earliest by taking appropriate measures."

4. As the vendors/transferors had not come forward to execute the agreement despite receiving part consideration, respondent no.1 was required to approach this Court by filing Suit No.179 of 2007. In a Notice of Motion No.302 of 2007, the learned Single Judge of this Court (S.A.Bobde, J. as His Lordship then was) was pleased to pass the following order on 24.1.2007.

"1. This is an application for ad interim relief. The defendants do not appear inspite of service on the advocates. Apparently, the defendants have disengaged the services of the advocate as is apparent from the affidavit of service and the affidavit dated 24.1.2007. The suit is based on an agreement referred to in a document styled as receipt dated `10.2.2006. Prima facie, it appears that the plaintiff agreed to buy the property referred to in the receipt for a sum of about Rs.4 crores. The agreement was to be signed upon the plaintiff paying a sum of Rs.1,90,00,000/- on or before 15.4.2006 to the owners i.e the defendants. There are apparently five co-owners. On 6.4.2006 the plaintiff wrote to the

defendants letter showing his readiness to execute the agreement to sell before 15.4.2006. The learned counsel for the plaintiff states that this letter has been received by the defendants. The plaintiff's ability to pay the said amount is also evident from a certificate by the ICICI bank dated 2.9.2006 that the plaintiff has a balance of Rs.4,42,63,889.73 in his account. It is stated on behalf of the plaintiff that the said amount is retained as balance in that account. In the circumstances, it appears that the agreement between the parties would be frustrated if the defendants were allowed to transfer or dispose of or create any third party interests or part with possession of the property in favour of any third person pending decision of the notice of motion. Hence, there shall be an ad interim relief in terms of prayer clause (b).

2. *Notice of motion is made returnable after two weeks."*

5. After the above order was passed by this Court, a Deed of Transfer dated 30.5.2007 came to be entered between the parties describing the flat in the schedule annexed to the agreement in the following terms which reads thus :

“ THE SCHEDULE ABOVE REFERRED TO

Five fully paid up shares of the face value of Rs.50/- each bearing distinctive Nos.1 to 5 (both inclusive) represented by Share Certificate No.1 of the Punam Co-operative Housing Society, together with the Flat No.1 on First Floor (comprising of Hall/Living Room, bedrooms, bathrooms, kitchen, pantry, storeroom, puja room etc. along with the annex block (two rooms and bathrooms) totally admeasuring approx.2410 sq.ft built-up area, alongwith one closed garage ameasuring approx 250 sq.ft built-up area, and one stilt car parking bearing No.1 admeasuring approx.140 sq.ft together with all the said benefits attached to the premises in the building known as Punam constructed in or about the year 1963). Punam Co-op Housing Society Limited, 67, Napean Sea Road, Mumbai-400 006 on the piece of land having Cadastral Survey No.3/358 of Malabar Cumballa Hill Division, Mumbai."

6. It is not in dispute that the petitioner-society had issued a share certificate bearing no.1, in favour of the transferors of respondent no.1, namely Mr.Bhatiya. After the sale was effected in favour of respondent no.1, it appears that the petitioner-society obstructed the entry of respondent no.1 to the flat and asserted that the sale of the said flat, in favour of respondent no.1 was illegal as 'no objection' or 'written consent' was not obtained from the petitioner.

7. The Advocate for respondent no.1 by his notice dated 5.6.2007 addressed to the petitioner, called upon the petitioner not to obstruct the peaceful occupation and possession of the respondent no.1. It was also recorded that there was no requirement of a no objection certificate for transfer of the flat. A copy of the Sale Deed and letter of possession was also forwarded to the petitioner.

8. The petitioner's advocate however in a reply dated 21.7.2007 addressed to respondent no. 1's advocate, recorded that respondent no.1 cannot claim any right to the open space/garden which respondent no.1 claimed to have conveyed and/or transferred to him, by the earlier owners (Bhatiya's) and recorded that the open space was a part of the petitioner's premises.

9. Thereafter, respondent no.1 by an application dated 4.3.2008 applied to the Secretary of the petitioner society for transfer of shares nos. 1 to 5 qua the said flat in favour of respondent no.1. All the necessary documents/prescribed forms, to effect transfer of the shares, along with the necessary fees were submitted by respondent no.1 to the petitioner. The Secretary of the petitioner by his letter dated 31.5.2008 informed respondent no.1 that the petitioner cannot accept respondent no.1 as a member, as respondent no.1 was claiming rights over the open space/garden. In the said letter, the Secretary of the petitioner recorded that according to the petitioner, the original owner Mr.Bhatiya had purchased the said flat having an area of 2050 sq.feet, and respondent no.1 did not have any right to the open space. It was recorded that respondent no.1 had adopted strong-arm tactics to use, the open space which had caused inconvenience and hardship to the members of the society. For these reasons, it was recorded that the petitioner-society cannot admit respondent no.1 as its member and rejected respondent no. 1's application, for transfer of the share certificate.

10. The above letter of the petitioner's Secretary was replied by the respondent nos. 1's advocate vide letter dated 21.6.2008 denying the

allegations of the petitioner. Respondent no.1 interalia asserted that he was a lawful transferee and purchaser of the said flat together with a garage, purchased from the previous owner Mr.Pratap Bhatiya and was entitled to transfer of share certificate nos.1 to 5. It was recorded that the sale deed was duly stamped and registered with the Sub-Registrar. It was recorded that when respondent no.1 sought to enter the premises to carry out repairs and renovations of the said flat, he was obstructed by the members of the society and security guards from entering the flat. Respondent no.1 stated that he was entitled to make an application dated 4.3.2008 to the petitioner for membership. As regards the open space, respondent no.1 stated that the open space attached to the garden, was in exclusive possession of respondent no.1, and same was under respondent no.1's lock and key as taken over by respondent no.1 from the predecessor-in-title namely the Bhatiya's, along with the shares certificate on 30.5.2007. It was stated that this fact was also admitted by the petitioner. It was denied that respondent no.1 had in any manner, used any strong-arm tactics as alleged by the society. The society was accordingly, requested not to impose extraneous terms and conditions to deny membership to respondent no.1. It was stated that rejection of respondent no.1's application was illegal and unlawful and made

with ulterior motives for which respondent no.1 will be required to take steps as per law.

11. Respondent no.1 ultimately approached the Deputy Registrar, Co-operative Societies "D" Ward, Mumbai by making an application under Section 23 (2) of the MCS Act, praying for directions to be issued to the petitioner to transfer the share certificate, in favour of respondent no.1, on the ground that respondent no.1 had lawfully acquired the said flat, with a further prayer to declare that the rejection of the share transfer application of respondent no.1 by the petitioner's communication dated 31.5.2008, was illegal.

12. By an order dated 10.10.2008 passed by the Deputy Registrar exercising powers under section 23 (2) of the MCS Act, respondent no.1's application was allowed. The petitioner was directed to grant membership to respondent no.1 qua flat no.1 by transferring the share certificates in favour of respondent no.1 within 15 days of the said order. This order of the Deputy Registrar is a detailed order, in which the objections as raised by the petitioner to the effect that respondent no.1 is encroaching on the open space/garden was rejected as irrelevant. The Deputy Registrar observed that these were

issues which would not fall within the jurisdiction of the Deputy Registrar under section 23 (2) of the Act and requiring adjudication in a civil suit. It was observed that considering the documents as submitted on behalf of respondent no.1, respondent no.1 was entitled for transfer of the shares in his favour qua flat no.1.

13. Being aggrieved by the said order dated 10.10.2008 passed by the Deputy Registrar, Co-operative Societies, the petitioner approached the Divisional Joint Registrar, in Revision Application No.483 of 2008 filed under section 154 of the MCS Act. The Divisional Joint Registrar heard the parties and by a detailed order upheld the order passed by the Deputy Registrar and dismissed the petitioner's revision application.

14. It is on the above backdrop, the petitioner is before this Court in the present proceedings, challenging the said orders passed by the original authority as confirmed by the revisional authority.

15. Learned counsel for the petitioner in assailing the impugned order, has made the following submissions :

- (a) It is submitted that the revisional order does not set out any reasons, to uphold the orders passed by the Deputy

Registrar, and on this ground the impugned order is required to be set aside.

(b) It is submitted that the Deputy Registrar as also the Revisional Authority ought to have considered that respondent no.1 was not entitled to transfer of the shares and membership of the petitioner-society inasmuch as respondent no.1 was claiming rights on the open space and garden which in fact belonged to the petitioner-society and of the society's ownership. Referring to the documents on record, it is submitted that respondent no.1 could not have asserted any right in regard on the open space and garden.

(c) As per the Deed of Transfer, the respondent no.1 would not be entitled for garden and open space as it was not sold to the respondent no.1 by the transferors/erstwhile owners. The authorities ought to have noticed that respondent no.1 had nonetheless taken possession of the flat, and of the open space and garden.

(d) It is submitted that grounds (c) and (d) of the petition pertain to a "sufficient cause" for the petitioner Society rejecting respondent no.1's application under section 23 of the MCS Act which have been completely over-looked by the authorities granting the application of respondent no.1.

(e) It is submitted that grant of share certificate in favour of respondent no.1 would amount to violation of the bye-laws of

the society. It is thus submitted that sufficient cause was made out under section 23 (2) of the MCS Act for rejection of the application.

16. On the other hand, learned counsel for respondent no.1 has made submissions referring to the reply affidavit as filed on behalf of respondent nos.1 and 2. It is contended that the Deputy Registrar has rightly held, that the reasons for rejection of the respondent no.1's application by the petitioner were unjustified and that the respondent no.1 ought to have been made a member of the society. It is submitted that the order of the Deputy Registrar is rightly confirmed by the order passed by the revisional authority by the impugned order dated 31.3.2009. It is submitted as by these orders membership having been conferred on respondent no. 1, since June, 2008, respondent no.1 has been exercising his legal rights as a member including making payment of all outgoings and dues of the society. It is stated that since April 2010 respondent no.1 was contesting the elections of the managing committee of the society and has received 8 out of 32 votes. It is stated that the society has never challenged nomination papers of respondent no.1, on any ground whatsoever. It is submitted that the petition is not filed bonafide. It is further submitted that the petitioners are falsely

disputing the exclusive use, occupation and possession of the garden and open space abutting to respondent no.1's flat and also ownership and occupation of the flat including two rooms and a closed garage. It is submitted that these contentions of the petitioner-society could only be tried and decided in a civil suit before the competent Court. It is submitted that in the facts of the case, the contentions as raised in this writ petition were available to the petitioner in previously instituted proceedings before the Cooperative Court at Mumbai in case No.CC/II/572 of 2008 as the averments in this petition are similar to the one's as made in the said proceedings before the Cooperative Court. It is contended that the petitioner-society had moved an application for interim reliefs in the said suit which was not granted. It is submitted that on the same cause of action, the petitioner-society has also filed a suit bearing No.1894 of 2010 in this Court in which Notice of Motion No.2271 of 2010 is filed, which is pending. It is further submitted that the authorities below have correctly passed the order, which is in consonance with the settled principles of law as laid down in the case of "***Videocon Appliances Ltd vs Maker Chambers V. Premises Co-op Hsg society***"¹ and in the case of "***Harish Commercial Premises C-op Soc Ltd vs Smt Varsha***

¹ 2006 (2) Mh.L.J.388

Dinesh Joshi². It is next submitted that Sections 22 and 23 of the MCS Act, provide for an open membership and the Society cannot act like private landlord and deny membership. It is submitted that the respondent nos. 1 and 2 are bonafide purchasers of the said premises for residence of respondent no.1, his wife and two school-going children at the relevant time. It is submitted that considering the provisions of Sections 22 and 23 of the MCS Act, respondent no.1 was eligible for the membership of the petitioner-Society as held by both the authorities. It is thus, submitted that the contentions which are urged on behalf of the petitioner are untenable and against law. It is submitted that in fact there is no conveyance of the land in favour of the petitioner and the land continues to stand in the name of the original owner/builders i.e.Mr.Frenny R.Gidwani and Bharat Lulla and thus even on this ground, the petitioner-society cannot assert the contentions in denying membership to the respondent no.1. It is submitted that in the report of the 42nd Annual General Meeting of the society held on 30.7.2006, the society has agreed that the flat is in exclusive use of the owner since last 35 years. Learned counsel for respondent nos. 1 and 2 refers to the following extract of the minutes of the said meeting:

2 2006 (2) All MR 1

"During the year the management has received proposal for transfer of shares in respect of Flat no.1 but the proposal is not considered by the committee in view that the owner member/occupant of Flat no.1 though he (i.e.Bhatia) agrees that the open space adjacent to his Flat belongs to the society, but it is in exclusive use of the owner member/occupant since 35 years and hence, do not want to surrender the open space back to the society."

17. Mr.M.A.Syed learned Assistant Government Pleader for the State has supported the impugned orders passed by the authorities below, to contend that the authorities have appropriately considered the documents and relevant provisions of Sections 22 and 23 of the MCS Act in holding that respondent no.1 is entitled for membership of the society and more particularly, in view of the Deed of transfer executed by the erstwhile owners of the flat in favour of respondent no.1.

Discussion and Conclusion:

18. On the above conspectus, I have heard learned counsel for the petitioner and learned counsel for the respondent no.1. I have also perused the record.

19. At the outset it needs to be observed that there are concurrent findings of both the authorities, against the petitioner. The jurisdiction of this Court under Articles 226 and 227 of the Constitution would be limited. It is certainly not an appellate

jurisdiction, that the Court would re-appreciate evidence and record a finding of fact different from what the authorities have concluded in this regard. The scope of the jurisdiction would be to examine any patent illegality or perversity in the orders passed by the statutory authority. It is on this premise the Court would examine the present case.

20. It is not in dispute that respondent no.1 has purchased the said flat as described in the schedule to the Deed of transfer dated 30.5.2007, which is a registered document executed between respondent no. 1 and the erstwhile owners. Admittedly, respondent no.1 made an application dated 4.3.2008 by submitting prescribed forms and documents seeking transfer of the share certificates qua the said flat, in his favour, which came to be rejected by the petitioner by its letter dated 31.5.2008. In the facts of the case, it will be necessary to consider the reasons for rejection as seen from the contents of the petitioner's letter dated 31.5.2008, which reads thus:

"The society is in receipt of your letter dated 4th March 2008 on above subject. It is indeed surprising that inspite of the correspondence which has taken place and which makes society's stand very clear you made an application to become member.

The society cannot accept you as the member in view of the fact that you are claiming rights in the society open space

garden also annexe rooms and also using strong arm tactics and making false allegation. According to the society, the original owner Mr. Bhatia and others had purchased the flat of 2050 sq.ft only. You were aware of the same fact and that is the reason you did not provide any document in support of proof as ownership of the open space garden annex etc. In fact, the present member has clearly accepted the fact that he does not have right on open space etc. In this regard the correspondence is self-explanation. You are truly aware of the same.

You have not stopped here but used strong arm tactics by bringing in some persons and threatening the security guards. Also made false police complaint and brought police Officer to the society to pressurize us. We were forced to seek intervention of the Mangal Prasad Lodha as it was not enough ou have tried to use force against society.

You have taken law in hands and also broke open the lock to the open space from lobby. You have also threatened the security guard of the society when you and six other persons came to the society's building at around midnight i.e. at about 12.30 a.m. on two occasions on the 14th and 15th April, 2008. This has caused inconvenience and tremendous hardship to the other members as also the staff of the society in use of maintenance etc of the compound. The facts are on record that in the large area on northern side falling around open space adjoining to flat no.1 you have kept security guards servants in the flat.

In view of the aforesaid and what is stated in the earlier correspondence, kindly note that society cannot accept you as the member and the application stand rejected. "

21. A reading of the above letter of the petitioner, clearly goes to show that the dispute between the petitioner and respondent no. 1 is in regard to the open space and garden, which according to the petitioner is not the entitlement of respondent no.1. On the other hand, respondent no. 1 appears to have refuted the petitioner's

assertion of any excess area being in possession of respondent no. 1 and he asserts that the area as specified in the agreement under which he has purchased the premises from the Bhatias is in his possession.

22. It, however, needs to be observed, that the petitioner in no manner has disputed the execution of the agreement/Deed of Transfer in favour of the respondent no.1 by the erstwhile owners. The petitioner has also not asserted that the transfer application of respondent no.1 was not in compliance with the bye laws of the petitioner or provisions of the MCS Act or Rules. It thus needs to be observed, that the reasons as recorded in the said letter of the petitioner in rejecting respondent no.1's membership application were totally extraneous to the requirements of the provisions of Section 23 and *ex facie*, on these reasons, application for transfer of the shares (membership) in favour of respondent no. 1 could not have been rejected.

23. In view of the rejection of the application for transfer of shares, respondent no.1 was entitled to approach the Deputy Registrar under the provisions of section 23 (2) of the Act and seek a direction to the

petitioner-society to accept respondent no. 1's membership application. A perusal of the order passed by the Deputy Registrar also shows that the Deputy Registrar has strictly adhered to the provisions of law and rules, in considering that the application of the respondent no.1 for transfer of shares was complying with all the statutory requirements. The rejection of the respondent No.1's share transfer application by the petitioner on the ground that the area in possession of respondent no. 1 is in excess or some of it belongs to the petitioner is no ground to reject transfer of shares and confer membership upon respondent no. 1, as the dispute in such a situation is purely, in the nature of a civil dispute. The Deputy Registrar rightly held that the grievances of the petitioner-society as reflected in the rejection letter was a civil dispute, between the petitioner and respondent no.1, on the open space and garden which could not have been a relevant consideration, when the petitioner considered respondent nos. 1's membership application, as it was an issue in regard to the ownership and/or entitlement of the said premises, for which the appropriate remedy for the petitioner was to file a civil suit and seek reliefs in that regard.

24. The petitioner has already invoked the jurisdiction of the Co-

operative Court against the erstwhile owners as also the respondent no.1 by filing a dispute before the Cooperative Court being case No.CC/II/572/2008 *inter alia* asserting the issue on the open space and the garden, now in possession of respondent no. 1. The prayers in the Dispute Application are required to be noted and reads thus:

"(a) That this Hon'ble Court be pleased to entertain and decide the present dispute under the provisions of section 91 to 96 of the M.C.S.Act, 1960.

(b) That this Hon'ble court be pleased to declare, direct and order that the Opponents hand over quiet, vacant and peaceful possession of the Flat no.1 First Floor,Punam, Punam Co-operative Housing society Ltd, 67, Napean Sea Road, Mumbai-400 006 to the Disputants;

(c) That this Hon'ble Court be pleased to declare, direct and order that the Opponent nos.1 to 5 the Opponent no.6 hand over quiet, vacant and peaceful possession of the annexe block admeasuring 400 sq.ft closed garage admeasuring 250 sq.ft stilt garage admeasuring 140 sq.ft and open space admeasuring 2000 sq.ft abutting the Flat no.1 First Floor, Punam, Punam Co-operative Housing society Ltd, 67, Napeansea Road, Mumbai-400 006 to the Disputants;

(d) That this Hon'ble Court be pleased to issue an order and permanent injunction restraining the Opponent nos.1 to 5 and the Opponent no.6 their servants, agents and any person/ persons claiming through and/or under them from putting their lock on and barring the entry of the members of the Disputants to the annexe block admeasuring 400 sq.ft closed garage admeasuring 250 sq.ft stilt garage admeasuring 140 sq.ft and open space admeasuring 2000 sq.ft abutting the flat no.1 First Floor, Punam, Punam Cooperative Housing Society Ltd, Napeansea Road, Mumbai-400 006 ;

(e) That this Hon'ble court be pleased to issue an order and permanent injunction restraining the Opponent nos. 1 to 5 and the Opponent no.6 their servants, agents and any person/persons claiming through and/or under them from entering and/or remaining on the annexe block admeasuring 400 sq.ft closed garage admeasuring 250 sq.ft stilt garage admeasuring 140 sq.ft and open space admeasuring

2000 s.ft abutting the Flat no.1, First Floor, Punam, Punam Co-operative Housing Society Ltd, 67, Napeansea Road, Mumbai-400 006.”

25. After approaching the Co-operative Court, the petitioner has also filed a suit before this Court being Suit No.1894 of 2008. In the said suit, Notice of Motion No.2271 of 2010 came to be filed seeking interim reliefs as noted above. Both the proceedings namely before the Co-operative Court and the suit filed in this Court are now clubbed together and are pending adjudication. These proceedings would decide whether the petitioner society or respondent no.1 would be entitled to the open space and garden.

26. Now coming to the relevant provisions of the MCS Act in regard to the grant of membership in a co-operative society, Sections 22,23 and 25 of the MCS Act deal with the membership of a Co-operative society. Section 22 (2) provides as to who can become a member of the society. Section 23 provides for open membership. Sub-section (1) provides that no society without sufficient cause can refuse admission to the membership to any person duly qualified thereon, under these provisions of the MCS Act and its bye laws. It would be necessary to note the provisions of section 23 of the Act

which reads thus :

“S.23 Open membership:

(1) No society shall, without sufficient cause, refuse admission to membership to any person duly qualified therefor under the provisions of this Act and its bye-laws.

(1A) Where a society refused to accept the application from an eligible person for admission as a member, or the payment made by him in respect of membership, such person, may tender an application in such form as may be prescribed together with payment in respect of membership, if any, to the Registrar, who shall forward the application and the amount, if any, so paid, to the society concerned within thirty days from the date of receipt of such application and the amount; and thereupon if the society fails to communicate any decision to the applicant within sixty days from the date of receipt of such application, and the amount by the society, the applicant shall be deemed to have become a member of such society] [If any question arises whether a person has become a deemed member or otherwise, the same shall be decided by the Registrar after giving a reasonable opportunity of being heard to all the concerned parties.]

(2) Any person aggrieved by the decision of a society, refusing him admission to its membership, may appeal to the Registrar [within a period of sixty days from the date of the decision of the society]. [Every such appeal, as far as possible, be disposed of by the Registrar within a period of three months from the date of its receipt:

Provided that, where such appeal is not so disposed of within the said period of three months, the Registrar shall record the reasons for the delay].

(3) The decision of the Registrar in appeal, shall be final and the Registrar shall communicate his decision to the parties within fifteen days from the date thereof.

(4) Without prejudice to the foregoing provisions of this section, in the case of agro- processing societies or any other society for which a definite zone or an area of operation is allotted by the State Government or the Registrar, it shall be obligatory on the part of such society to admit, on an application made to it, every eligible person from that zone or the area of operation, as the case may be, as a member of such society, unless such person is already registered as a member of

any other such society, into the same zone or the area of operation."

27. The law in regard to consideration of a membership application by co-operative society under the provisions of sections 22 and 23 of the MCS Act is no more resintegra.

28. It is well settled that whenever a membership application is filed, the society cannot enter into an investigation of the title of the transferor, which would involve the society assailing the Deed of Transfer executed by a transferor (former member) in favour of the transferee (in-coming member), who is applying for transfer of membership qua the acquired flat.

29. In **Harish Commercial Premises Co-op Society Ltd vs Smt Varsha Dinesh Joshi** (supra), this Court held that the membership of a co-operative society is a open membership and if a person is in lawful possession of the premises, then, membership cannot be refused to such a person. In para 11 and 12, the Court observed thus :

11. " On the other hand, the learned counsel for the respondent has produced before me the permission granted by the corporation and even the sanction plan given by the corporation giving them the authority and sanction for construction oin the said open plot of land.

The rights in the land was conferred on the respondents by entering into specific agreement between the builder Bitesh Sagar with the respondents herein. The agreement is on record. There is no dispute as to the agreement which has been entered into already as far back as in 1981. The petitioner society has not taken any steps by filing civil proceedings or civil suit challenging the said agreement and seeking cancellation thereof. Thus, at this stage to hold that the respondents are not entitled to the membership because there is no valid agreement entered into by them is not possible. Apart from the aforesaid fact I am of the opinion that the contention of the learned counsel for the petitioner totally lacks merits. It is because firstly the builder has entered into conveyance in 1978 being the chief promoter of the proposed society, the present members were not in the scene in 1978. Thus after the conveyance is obtained the builder has sold the commercial premises to various persons who have subsequently become the members of the petitioner society. Thus the members of the petitioner society are holding the said agreement form Bitesh Sagar in his capacity as builder and thus they have become entitled to become a member of the petitioner society. It is not possible to accept the contention of the learned counsel for the petitioner that while it comes to creating the rights in commercial premises in favour of the member of the petitioner society Bitesh Sagar had an authority and power to enter into such an agreement but when it comes to the execution on the right in favour of the respondent the very same Bitesh Sagar had no authority to enter into such an agreement. In my opinion prior to the society being registered the builder has constructed the building for the proposed co operative housing society and thereafter sold to various persons commercial premises in the said building. It is these purchases of the commercial premises who have subsequently formed the society and have become the members thereof. Similarly the said premises are sold to the respondent by the very same builder and has been given a power to construct the structure thereon. In so far as the respondents are concerned there is another factor which has to be taken into consideration. Originally the respondents were having a structure on the road further purpose of construction of the building and or for the purpose of road widening the said structures of the respondents have been demolished and as and by way of an alternate accommodation an arrangement has been arrived at between the promoters of the then proposed society and corporation under which expressly it has been agreed that the respondent will be accommodated in the premises of the petitioner society by the builder and on that basis permissions are issued by the corporation and sanction plan permitting the respondents to carry on construction on the small portion of the open premises of the building so as to rehabilitate them has been granted. The

permission and sanctioned plan which are produced before me by the respondents leaves no manner of doubt that the construction of the respondents are legal, valid and that the respondents have in fact acquired the right in the said premises by entering into usual agreement with the builder as far back as 1981. The respondents are in possession of the said premises right from 1983 when the structure has been constructed by them pursuant to the rights created in their favour. The respondents having given up their original accommodation on the basis of aforesaid alternate accommodation arrived at, it is not possible to accept the contention of the petitioner that they should not be made member of the petitioner society. Membership of the society is an open membership and if a person is in lawful possession of a premises of the society then the membership cannot be refused to such a person by not adding the respondent as a member of the society would amount to denying the benefits of the membership under the Act conferred on each and every person who is the occupier of the premises of the building. In any event, I do not find any compelling reason that the respondents should not be made the members of the petitioner society. The rights of the respondents prima facie cannot be held illegal under the said agreement nor a structure can be considered as unauthorised when there is a permission from the corporation.

12. In any event, I am of the opinion that in the proceeding arising under section 23 of the Maharashtra Cooperative Societies act what is required to be considered is prima facie whether the respondents who are claiming to be the member are the lawful occupiers and have right, title and interest in the said property on the basis of which he is seeking membership of the society. The jurisdiction of the Registrar under section 23 does not extend to determine the validity and/or otherwise the documents which are already executed in favour of the concerned person because that is the jurisdiction of the civil court and if any person raising any challenge to the said agreement is required to file appropriate civil suit. Prima facie in this case the respondents have got an agreement in their favour and also permission in their favour from the BMC for the purpose of constructing the said property. In that view of the matter I am of the opinion that the contention raised by the petitioner that the respondents are not entitled to be the member because they are unlawful and unauthorised occupier of the said construction cannot be accepted. In that view of the matter, petition fails. The order passed by the Divisional Joint Registrar dated 07.01.2002 is confirmed. However, there shall be no order as to costs. "

30. *RNA Classics vs Dy Registrar, Cooperative societies*³, a learned single Judge of this Court referring to the decision in **Harish Commercial Premises** (supra) and in **Videocon Appliances Ltd** (supra) held that the jurisdiction of the Registrar under section 23 of the Act does not extend to determine the validity and/or otherwise of the documents which are executed in favour of the concerned person because, it is the jurisdiction of the Civil Court and if any person seeks, to raise any challenge to the agreement, he is required to file a civil suit. In para 14, the Court made the following observations :

“CONSIDERATION

14] Having heard the learned counsel for the parties, I have considered the rival contentions. As indicated above, the issue which arises for consideration is the claim for membership made by Respondent No.2 in each of the above Petitions. It is required to be noted that along with the application for membership, amongst the documents submitted was the Gift Deed executed by Manju Gupta in favour of the Respondent No.2 in respect of the flat/shop in question, which Gift Deed was registered with the Registrar, Bandra. To the said Gift Deed, a declaration of the family settlement dated 7/1/1999 was appended. The other requirements for membership i.e. payment of transfer fees etc were also submitted with the application. The Petitioner-Society by the letter dated 22/09/2011 replied to the said application and as indicated above asked the Respondent No.2 to furnish the entire chain of agreements from the builder till date. The said letter was replied to on behalf of the Respondent No.2 through her advocate M/s.Kotak & Associates by a letter dated 16/12/2011 who informed the Petitioner-Society that all the compliances have been made by the Respondent No.2. The said letter was replied to by the Advocates for the Petitioner-Society by which it was communicated to the Respondent No.2 that unless the compliances are made, the application for membership would not be processed with and that the

3 Writ Petition No.10847/13 group dated 12.03.2014

Respondent No.2 may approach the concerned authority if she so deems it fit. There is therefore merit in the submission of the learned Senior Counsel appearing on behalf of the Respondent No.2 that the Petitioner-Society whilst considering the application for membership was entering into the realm of enquiry into the title of the Respondent No.2 to the flat/shop in question. In the said context, it is required to be noted that by the judgments in Harish Commercial Premises (supra), and Videocon Appliances Ltd. (supra) the scope of inquiry whilst considering the application for membership has been enunciated by a learned Single Judge of this Court. It would therefore apposite to refer to the said judgments at this stage. In Harish Commercial Premises (supra) case, the agreement on the basis of which the membership was claimed was sought to be questioned by the society concerned therein. The learned Single Judge of this Court held that the society has not taken any steps by filing civil proceedings or civil suit challenging the said agreement and seeking cancellation thereof. The learned Single Judge whilst so holding held that the jurisdiction of the Registrar under Section 23 does not extend to determine the validity and/or otherwise of the documents which are already executed in favour of the concerned person because that is the jurisdiction of the civil court and if any person seeks to raise any challenge to the said agreement he is required to file appropriate civil suit. In so far as Videocon Appliances (supra) case is concerned, the membership of the society was denied to the applicant on the ground that the flat in respect of which the membership was sought was constructed contrary to and in breach of Section 7 of Maharashtra Ownership Flats Act, 1963 as the consent of the existing unit holders was not obtained by the builder. In the said context, the learned Single Judge held that whether the construction is authorised or unauthorised is a matter which is a civil dispute and has to be determined by the Civil court and neither the co-operative society nor the Deputy Registrar nor the higher authority is empowered to go into the aspect for determining whether a person is entitled to be a member or not. The learned Single Judge has further held that the aspect as to whether a person has to be granted membership has to be considered on the touchstone of the rules, regulations and bye-laws and not on the basis of external factors such as whether the construction of the premises which is sought to be purchased by him is legal, illegal or authorized or unauthorised. In the light of the aforesaid pronouncements the scope of an inquiry pursuant to an application for membership is enunciated. The Petitioner-Society in my

view, could not deny the membership to the Respondent No.2 on the ground that there was non-compliance in the matter of providing the chain of agreements as was sought by the letter dated 22/9/2011. In requisitioning the said information the Petitioner-Society was virtually embarking upon an exercise of investigation into the title of the flat/shop in respect of which the membership was claimed by the Respondent No.2 which it was not entitled to it. Hence in so far as the said aspect is concerned, the orders passed by both the authorities below cannot be faulted with.”

31. In “*Apna Sahakari Bank Ltd. & Anr. Vs. Matulya Centre Premises Co-op.Soc.Ltd. & Ors.*”⁴ this Court considering the provisions of Section 23 of the MCS Act, has observed thus:-

“32. The basic requirement of Section 23 of the MCS Act which provides for “Open Membership” is that no society shall without sufficient cause, refuse admission to membership to any person under the provisions of the MCS Act and its bye-laws. The society also cannot refuse membership to a person who is in lawful occupation of the premises in the society. This would tantamount to denying the legitimate entitlements and benefits to a person who is in lawful occupation of the premises. The word “sufficient cause” as contained in Section 23(1) is required to be understood in the facts and circumstances of each case, to ascertain whether there is sufficient cause for the society to deny membership.

.... .

36. Considering the above position in law in the context of Section 22 and 23 of the MCS Act it thus becomes clear that it would not be lawful for the society to investigate and/or to make an inquiry in the perfection of the title of the applicant who is seeking a membership. In the present case, the basic requirements which would entitle the petitioner to obtain a transfer of shares in its favour, were very much present namely a registered sale deed dated 30 December 2002 executed in its favour by Capstan. In the absence of any proceedings to challenge Capstan's entitlement to transfer the suit premises to the petitioner by virtue of which the petitioner was to be in possession in the year 2002, it was surely not open for the society to overlook

4 Writ Petition no.468 of 2010, Order dt.16/4/19.

these glaring facts and deny the petitioner's membership of the society.

32. Thus, a society asserting rights on premises adjoining to a flat cannot deny membership to a person who had appropriately and adhering to the rules had applied for membership. Once there was a registered agreement and it was not declared to be illegal by competent court the society cannot reject the membership application and refuse to transfer the shares.

33. The above discussion would make it clear that the contentions as raised on behalf of the petitioner are wholly un-tenable. The impugned orders have recorded proper and appropriate reasons within the parameters of law, necessary for the authorities to exercise jurisdiction under section 23 of the MCS Act. In the facts and circumstances, there were sufficient reasons and materials for the authorities below, to conclude that respondent no. 1 was required to be admitted as a member of the petitioner society and consequently to direct the petitioner-society to admit respondent no.1 as its member by transferring the share certificates in favour of respondent no.1.

34. In urging that the reasons are insufficient, the petitioners have not pointed out as to which are the reasons which were required to be set out and as to what is the prejudice which has been caused to the petitioner in absence of such reasons. Thus the argument of the petitioner that the impugned order passed by the revisional authority lacks sufficient reasons apart from being hollow is totally untenable and is required to be rejected.

35. The other contentions as urged on behalf of the petitioner that there is a dispute in regard to the open space and garden and hence membership cannot be conferred on respondent no. 1 is also untenable in view of the clear provisions of law and as laid down in the decisions of this Court as discussed above. The petitioner's assertion is totally extraneous to the basic requirements for the applicability of section 23 of the Act. Moreover, such contention as urged on behalf of the petitioner is against the provisions of section 23 of the Act as also the interpretation of these provisions in the decision of this Court in **Videocon Appliances Limited and RNA Classics** *supra*(*supra*) and in **Harish Commercial Premises** (*supra*). None of the grounds as set out in the petition makes out any case for interference in this petition.

36. In support of his submissions, learned counsel for the petitioner has placed reliance on the decision in **President, Nagarpalika Prathamik Shala Shikshak Servants Co-operative Credit Society Ltd vs Ramchandra Damodar Umalker 1967 C.T.D.(H)**. The reliance on this decision is not well-founded in as much as this was a case before the society could take a final decision. The respondent no.1 therein had approached the authorities for a direction to the society to make the respondent as a member of the society. It is in this context, the observations were made that the proceedings were not maintainable before the authority under section 23 of the Act. The facts in the present case are completely different inasmuch as the application of the respondent no.1 was rejected by the petitioner-society have no application to the facts of the present case. In any case now there is a complete interpretation to the provisions of Section 23 as noted above in the recent decisions.

37. As a result of the above discussion, with certainty, it can be concluded that there is no merit in the present petition. The petitioner is not entitled to any reliefs in the present petition. The petition is accordingly rejected however subject to the above

observations.

38. It would be open to the petitioner to agitate all issues on the ownership/entitlement qua the open space and garden in appropriate proceedings including the pending proceedings. All contentions of the parties in that regard are expressly kept open.

39. There shall be no order as to costs.

{G.S.KULKARNI, J}